IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CLINTON ALLEN PRATHER, Appellant.	No. 37146-4-II unpublished opinion

Penoyar, J. — Clinton Prather appeals his convictions of second degree assault, two counts of felony harassment, and second degree malicious mischief, with firearm enhancements. Prather argues that the trial court erred by (1) denying his motion to suppress evidence obtained from his car; (2) failing to dismiss the second degree assault charge; (3) failing to find that the second degree assault and the felony harassment convictions were "same criminal conduct" for sentencing purposes; (4) miscalculating his offender score at sentencing; and (5) not specifically referencing which convictions formed the basis for the no contact order. Prather makes one argument, in the alternative, on the evidence suppression issue and claims several more errors in his statement of additional grounds (SAG).[1] The State concedes one sentencing issue, but otherwise, none of Prather's claims has merit and we affirm his convictions. We remand for resentencing and instruct the trial court to clarify the no contact order.

[1] RAP 10.10.

FACTS

I. The Incident

Joshua Bryant celebrated his birthday on the evening of July 27 and early morning of July 28, 2007, by going to a bar with some friends. Afterwards, he returned to the Kelso, Washington home he shared with his girlfriend, Angelina Hogman, and their three children.

Shortly thereafter, around 2:30 a.m., Prather arrived at Bryant's home with two women. Prather and Bryant had been friends for 15 years and had been, for a time, close friends, but they had not seen each other for about one year. Prather had never met Hogman, and neither Hogman nor Bryant was familiar with the two women accompanying Prather. After a warm greeting and talking for several minutes, Prather asked one of the two women to go to the car and retrieve two firearms, a shotgun and a pistol. Prather explained that he had been in some trouble earlier and that he wanted Bryant to keep the guns at his house. Bryant told Prather that he could not keep the guns at his house. Prather then took the guns, gave them to one of the women, and had her put them back into the car.

After giving the woman the guns, Prather asked to use Bryant's cellular phone, which Bryant let him use. Bryant became concerned after overhearing a portion of Prather's phone call and he asked for the phone back. Prather hung up the phone and started yelling at Bryant, calling him obscene names and berating him for not helping a friend in need.

Next, Prather took the bottle of beer he had been drinking and threw it at Bryant's truck windshield. The beer bottle struck the windshield, breaking it. Prather then took off running down the street toward his car, and Bryant pursued him. After several blocks, the two men had a

brief scuffle, Bryant tripped, fell on the ground, and then Prather ran to his car.

After Bryant fell, Hogman helped him up and the pair walked back to the house. Upon returning to the house, the pair stood on the stoop of the house for several minutes trying to figure out what to do. At that time, Prather returned to Bryant's house in the car. One of the two women drove the car and Prather rode in the back seat. They pulled into the driveway and Prather got out of the car right by the stoop, carrying a sawed-off shotgun.

Prather pulled the shotgun up, pointed it at Hogman, and then pointed it directly at Bryant's head and neck. The end of the shotgun barrel was close to Bryant's face. Prather held the shotgun on Bryant, while Hogman hid behind the truck. From behind the truck, Hogman dialed 911. After getting the police on the phone, Hogman yelled, "The cops are coming. The cops are coming." 2 Report of Proceedings (RP) at 146. At this Prather threatened to kill Bryant, kill Hogman, take the truck, and come back and burn the house down.[2]

Prather then left Bryant's house and the police arrived several minutes later. Both Bryant and Hogman were afraid that Prather would return to the house and so they woke up their children and the police escorted them to a local hotel where they stayed the night. The family stayed an additional night at the hotel, afraid to return to their home.

[2] Bryant testified, "[Prather] was screaming about what a gangster he was and that he was going to kill me and kill [Hogman], come back, burn the house down and my truck was going to be gone." 2 RP at 106. Hogman testified that she heard Prather say, "You're dead. She's dead. Your truck's gone. Burn your house down." 2 RP at 146.

II. The Arrest and Search

Kelso police arrested Prather at an apartment rented by Tracy Pavone. Police found Prather hiding under a blanket. Within reach of Prather, underneath a loveseat, police located and seized a pistol. Police read Prather his *Miranda*[3] warnings and placed him in the police car.

Prather then asked police to make sure his car, a Toyota MR2, was secured and moved to the street so the apartment complex owner would not tow it. Prather did not have the keys, but he told the officers that another person on scene did and that they could get the keys from that person. The officers obtained the keys and went to move the car.

Officer Hines approached the car and noticed what he thought to be marijuana flakes inside the passenger cabin. He also noticed an odor of marijuana emanating from the passenger cabin through the slightly open windows. Hines then contacted Deputy Prusa, a dog handler for the Kelso K9 unit, and had her respond to the scene with her drug sniffing dog, Annie. Prusa "applied" the dog to the MR2 and to the vehicle next to it. 3 RP at 221. Annie "alerted" on the MR2, at which time, Prusa began the process of obtaining a search warrant for the car. 3 RP at 221.

After obtaining the warrant, police searched the car. They located a "drug kit" in a compartment in the trunk of the car, with several hypodermic needles and cotton ball filters inside. 3 RP at 223. Police also located a baseball bat and a sawed off shotgun in the car's passenger compartment. Hines testified that the gun was wrapped in a black t-shirt and that when he grabbed the shirt, he immediately felt the pistol grip and knew a gun was inside.

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

On August 1, 2007, the State charged Prather with two counts of second degree assault with firearm enhancements,[4] four counts of felony harassment with firearm enhancements,[5] two counts of unlawful possession of a firearm,[6] one count of second degree malicious mischief[7] and one count of unlawful use of drug paraphernalia.[8]

III. Suppression Hearing and Trials

Before trial, Prather moved to suppress the discovery of the pistol and the shotgun. Prather argued that he was an occupant of the apartment where the pistol was located and he did not give his consent to search the apartment. After testimony from police officers and Prather, the trial court found that there was no evidence that Prather was an occupant and that proper consent for the search had been given by the only occupant present, Tracy Pavone. Regarding the shotgun, Prather argued to the trial court that the warrant to search the MR2 was issued as a result of an illegal canine "sniff" on the car. The trial court determined that the canine sniff was not an improper search and that the shotgun was admissible at trial.

On the second day of trial, the State dropped the two illegal firearms charges and amended the second degree assault to attempted second degree assault.[9] During trial, the jury heard from

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[4] For Bryant and Hogman under RCW 9A.36.021(1)(c). Firearm enhancements pursuant to RCW 9.94A.602 and RCW 9.94A.533(3).

[5] For Bryant, Hogman, and the two children inside the house, under RCW 9A.46.020(1)(a)(i) and (2)(b)(ii). Firearm enhancements pursuant to RCW 9.94A.602 and RCW 9.94A.533(3).

[6] RCW 9.41.040(1)(a).

[7] RCW 9A.48.080(1)(a)

[8] RCW 69.50.412(1).

Bryant, Hogman, multiple police officers, and Prather. The jury found Prather not guilty of attempted second degree assault against Hogman and not guilty of felony harassment against the two children. The jury found Prather guilty of felony harassment against Bryant and Hogman (with firearm enhancements), and guilty of second degree malicious mischief. The jury could not reach a verdict on the second degree assault charge against Bryant, and the trial court declared a mistrial on that count.

Two weeks later the State retried Prather on the second degree assault charge. Just before trial, Prather moved to dismiss the assault charge arguing that it was barred by double jeopardy. Prather argued that the facts of the assault were relied on in finding guilt on the harassment charge where Bryant was the victim. The trial court denied the motion and trial proceeded. The jury found Prather guilty of second degree assault with the firearm enhancement.

IV. Sentencing

At sentencing, the State and Prather argued whether his offender score based on prior convictions was an 8 or a 9. The difference hinged on whether a prior conviction for attempted second degree assault should be scored as 1 point or 2 points. The trial court scored it as 2 points, resulting in an offender score (before current offenses were added) of 9.

Prather also argued that the assault and harassment against Bryant should be considered the "same criminal conduct" for sentencing purposes. Clerk's Papers (CP) at 125. The trial court did not explicitly address this issue, but it did so implicitly by counting them separately in calculating Prather's offender score. Additionally, the trial court entered an harassment no

[9] The trial court also dismissed the drug paraphernalia charge at the close of the State's case in chief.

contact order prohibiting Prather from contacting Bryant or Hogman for 10 years. The order did not specify the charge on which it was based.

ANALYSIS

I. Motion to Suppress

A. Canine Sniff Not an Unlawful Search

Prather argues that the trial court erred in denying his motion to exclude the shotgun found in his car because the use of a trained canine to sniff his car constituted a warrantless search and violated his rights under article I, section 7 of the Washington Constitution. We agree with the State that the search was proper.

We will not disturb a trial court's rulings on a motion to suppress absent abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). When a trial court's discretion is manifestly unreasonable or based on untenable grounds or reasons, an abuse of discretion exists. *Powell*, 126 Wn.2d at 258. "In short, discretion is abused only where it can be said no reasonable man would take the view adopted by the trial court." *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977).

Article I, section 7 of the Washington Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The relevant inquiry on whether there has been a search under the Washington Constitution is "whether the State has unreasonably intruded into a person's 'private affairs'." *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994) (quoting *State v. Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990)).

The State concedes that, in some cases, a canine sniff may constitute a search that requires a warrant. The State discusses *State v. Dearman*, where the court held that a warrant was required to use a canine sniff on a residence. 92 Wn. App. 630, 635, 962 P.2d 850 (1998). The State properly notes, however, that there are also cases where Washington courts have held canine sniffs do not violate privacy rights. *State v. Stanphill*, 53 Wn. App. 623, 631, 769 P.2d 861 (1989) (court held there was no search where a canine sniff was conducted on a package at the post office); *State v. Boyce*, 44 Wn. App. 724, 730, 723 P.2d 28 (1986) (court held that a canine sniff of a safety deposit box at a bank did not require a warrant); *State v. Wolohan*, 23 Wn. App. 813, 820, 598 P.2d 421 (1979) (court held that a canine sniff of a package being sent by a common carrier was not an illegal search because the defendant had no reasonable expectation of privacy in the area in which the examined parcel was located).

Before engaging in a detailed analysis of the sniff, we note that Hines detected the odor of marijuana on his own before calling for the canine sniff.[10] As noted in *State v. Seagull*, "[a]s a general proposition, it is fair to say that when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a 'search'. . . ." 95 Wn.2d 898, 901, 632 P.2d 44 (1981) (quoting 1 W. LaFave, Search and Seizure § 2.2, at 240 (1978)). Hines had permission from the defendant to secure the vehicle and he was in the process of doing so when he noticed what he thought were marijuana leaves on the car's upholstery and the odor of marijuana coming through the open window. Based on Hines's observations alone, the court

[10] Prather does not challenge Hines's observations.

could have issued a valid search warrant, making the discovery of the shot gun inevitable. In this case, the canine sniff did not enhance the police officer's abilities in an impermissible way.

The United States Supreme Court noted in *United States v. Place*, that a canine sniff is *sui generis* and cannot be examined like other searches. 462 U.S. 696, 707, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983). The guiding principle emerging from Washington case law is that "[a]s long as the canine sniffs the object from an area where the defendant does not have a reasonable expectation of privacy, and the canine sniff itself is minimally intrusive, then no search has occurred." *Boyce*, 44 Wn. App. at 730.

It is difficult to see how Prather has any expectation of privacy in the odor surrounding his car parked with the windows partially open in a location open to the public, albeit on private property. In *Boyce*, the court held that the sniff of a locked safety deposit box in a bank vault was not a search. Here, we hold that a sniff of Prather's car is also not a search. Clearly, one would reasonably expect more privacy in a locked deposit box than in a car similarly situated to Prather's.

Prather correctly notes that Washington courts have long held that "the right to be free from unreasonable governmental intrusion into one's 'private affairs' encompasses automobiles and their contents." *State v. Parker*, 139 Wn.2d 486, 494, 987 P.2d 73 (1999). It is also true, though, that there is "no protected privacy interest in what [can be] visually observed in [] public places." *State v. Young*, 123 Wn.2d at 190. Prather's car and contents may be protected, but the canine sniff occurred in a parking lot open to the public where Prather did not have a reasonable expectation of privacy.

The only Washington cases of note finding a canine sniff to be a search, involve a canine sniff at private residences where there is no dispute that an individual has a reasonable expectation of privacy. Prather does not cite to a case where a Washington court has held a canine sniff on a vehicle to be an impermissible, warrantless search. Given the facts and case law presented to the trial court, we cannot say it abused its discretion in admitting the evidence from the car.

II. Double Jeopardy

In the first trial, the jury found Prather guilty of felony harassment for threatening to kill Bryant. The jury was not able to reach a decision with respect to the second degree assault charge against Bryant, and the trial court declared a mistrial. At the beginning of the second trial for the assault charge, Prather argued to the trial court that allowing the second trial to proceed would put him in jeopardy for the same act: threatening Bryant with a gun while simultaneously threatening to kill him. The trial court permitted the trial to continue, and the jury found Prather guilty of second degree assault. Prather now argues that the trial court erred. The State responds that both convictions are valid as they are not the same in law or in fact.

The Fifth Amendment of the United States Constitution and article I, section 9 of the Washington State Constitution prohibit multiple punishments for the same offense. Whether a proceeding violates double jeopardy is a question of law we review de novo. *State ex re. Eikenberry v. Frodert*, 84 Wn. App. 20, 25, 924 P.2d 933 (1996).

At issue in any double jeopardy analysis is whether the legislature intended to impose multiple punishments for the same event. *In the Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004); *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). Courts may

discern the legislature's purpose by applying the tests set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932) ("same elements test"). *Calle*, 125 Wn.2d at 777-78. Under *Blockburger*, "[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. at 304. Under the Washington rule, double jeopardy attaches only if the offenses are identical in both law and fact, which is demonstrated when "the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other." *State v. Reiff*, 14 Wash. 664, 667, 45 P. 318 (1896) (quoting *Morey v. Commonwealth*, 108 Mass. 433, 434 (1871)). The "same elements" test and the "same evidence" test are largely indistinguishable. *Orange*, 152 Wn.2d at 816.

Second degree assault and harassment have different elements. The second degree assault elements are (1) an assault and (2) use of a deadly weapon. RCW 9A.36.021(1)(c). An assault may consist of an intentional touching that is harmful or offensive; an act performed with the intent to inflict bodily injury but failing, coupled with the apparent present ability to inflict the injury if not prevented; or an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which creates in another a reasonable apprehension and imminent fear of bodily injury. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 35.50, at 547 (3d ed. 2008) (WPIC); *see also Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 505, 125 P.2d 681 (1942); *State v. Garcia*, 20 Wn. App. 401, 402-03, 579 P.2d 1034 (1978); *State v. Murphy*, 7 Wn. App. 505, 511, 500 P.2d 1276 (1972).

A deadly weapon is any device, which under the circumstances in which it is used is readily capable of causing death or substantial bodily injury. RCW 9A.04.110(6). Thus, to convict Prather of second degree assault, the State had to present evidence that he, using an instrument capable of causing serious injury under the circumstances, intentionally touched Bryant in an offensive manner, intentionally attempted to injure Bryant and failed, or intentionally acted in a way to cause Bryant to fear imminent bodily injury.

Felony harassment, by contrast, consists of (1) a knowing threat, (2) to cause bodily injury immediately or in the future, and (3) words or conduct placing the person threatened in reasonable fear that the threat will be carried out.[11] RCW 9A.46.020(1). Accordingly, to convict Prather of harassment, the State had to present evidence that he knowingly communicated to Bryant an intent to cause him bodily injury immediately or in the future and that Bryant was placed in reasonable fear that Prather would carry out the threat.

A plain language reading indicates that the legislature intended to distinguish felony harassment and second degree assault as distinct offenses. The harassment statute specifically criminalizes threats to injure or kill another, which, standing alone, are insufficient to establish an assault. Both offenses are set forth in different chapters of the Washington Criminal Code, title 9A RCW, and address different social concerns. Although assault addresses concerns about physical harm, criminal harassment aims to prevent invasion of individual privacy. *See* RCW

[11] A threat is a direct or indirect communication of the intent to cause bodily injury in the future. WPIC 2.24, at 71; RCW 9A.04.110(27)(a) (formerly (25)(a)). A defendant acts knowingly when he or she is aware of a fact, circumstance, or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime. A defendant also acts knowingly if he or she acts intentionally. WPIC 10.02, at 206; *see also* RCW 9A.08.010(1)(b), (2).

9A.46.010. These differences in aim and purpose, demonstrated by the legislature's establishment of different essential elements, indicate that felony harassment and second degree assault do not constitute the same offense for purposes of double jeopardy.

To violate double jeopardy, a defendant's offenses must be "identical both in fact and in law," and we have established that Prather's offenses are not the same in law. Therefore, it is unnecessary to continue the analysis further. *Reiff*, 14 Wash. at 667. Second degree assault and felony harassment convictions are not the same in law and, thus, Prather was not put in jeopardy twice for the same offense. We affirm these convictions.[12]

III. Same Criminal Conduct

Prather argues that the trial court abused its discretion when it found that counts I (second degree assault) and III (felony harassment) were not the same criminal conduct for sentencing purposes. The State contends that the trial court's determination was proper. Because Prather's final offender score would have been 9 or more despite any determination regarding his argument here, the issue is moot, and we will not consider his claim.

Before the current offenses, Prather had seven felony convictions, resulting in a sentencing

[12] The convictions also required proof of different facts. To prove second degree assault, the State had to show that Prather used a deadly weapon to place Bryant in fear of bodily injury. Evidence that Prather used a weapon is unnecessary to prove harassment. Similarly, when Prather told Bryant that he planned to kill him (and Hogman and burn down the house), the communicated threat was necessary to sustain the harassment conviction. The communication was not necessary to prove the second degree assault charge. Thus, the same facts do not support both convictions; a distinct fact must be proven to sustain each conviction, both in the abstract and under the facts of this case. Because the evidence required to sustain a conviction on one charge would not have been sufficient to sustain the other, the crimes are not the same offense.

score of 7 points. At the very least, Prather's current convictions would add 3 points to this score—this is because the sentencing enhancements each count for one point, even if we were to find the harassment conviction to be the same criminal conduct as the assault. Additionally, another point is added because Prather committed the current offenses while on community placement/custody. This puts Prather's score, at the very least, at 11 points. Since nothing we could do would put Prather's score below 9, we find this issue moot.

IV. Offender Score Calculation

In general, when sentencing a defendant under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, the trial court must calculate the defendant's offender score, in part based on his criminal history in order to determine the standard sentencing range. RCW 9.94A.525. The SRA assigns a point value to prior and current offenses, and the defendant's total sum equals the defendant's offender score. We review the calculation of an offender score de novo. *State v. Allyn*, 63 Wn. App. 592, 596, 821 P.2d 528 (1991), *overruled on other grounds*, *In re Pers. Restraint of Sietz*, 124 Wn.2d 645, 650, 880 P.2d 34 (1994). An illegal or erroneous sentence is reviewable for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); *See also State v. McCorkle*, 137 Wn.2d 490, 496, 973 P.2d 461 (1999).

Prather argues that the trial court erred by counting his prior second degree attempted assault as two points. He argues this offense should have only counted as one point because it was an attempt crime, which is not classified as a violent offense. He asserts the court should have interpreted RCW 9.94A.525(5)(a)(ii) and (8) to exclude attempt offenses from the "doubling" provisions for violent crimes because second degree attempted assault is not defined

as a violent offense under RCW 9.94A.030(45). He also asks us to reject the holding in *State v. Becker*, which held under an earlier SRA provision that anticipatory crimes are to be treated the same as completed crimes for the purpose of offender score calculations. 59 Wn. App. 848, 851, 801 P.2d 1015 (1990). Prather argues that Division One of this court misapplied the rules of statutory construction in *Becker* by failing to apply the definition of "violent felony," which does not include anticipatory offenses, or the rule of lenity.

The State contends that RCW 9.94A.525 governs offender score calculations and explicitly provides that anticipatory offenses are to be treated the same as completed crimes. It argues that the rationale of *Becker* is still valid today because the statute's language was not changed when it was recodified, and the court rejected the same arguments in *Becker* that Prather raises in this appeal. We agree.

In *Becker*, Division One acknowledged that second degree attempted robbery is not a "violent offense" under the statute. 59 Wn. App. at 851. The court held, "Nonetheless, in determining Becker's offender score, the prior attempted robbery is treated the same as the completed offense of robbery in the second degree, which is a violent crime, and therefore receives two points." *Becker*, 59 Wn. App. at 852. Division One stated:

> The apparent conflict in the sections is based on the assumption that the attempted robbery can only receive two points if it is a "violent offense". Contrary to Becker's contention, the offense does not receive two points because it is a violent offense, but rather, it receives two points because the completed crime of robbery in the second degree would receive two points and the attempted robbery is to be treated as a completed crime. According to the plain language of RCW 9.94A.360(5)[13] the attempt must be treated the same as the completed crime. Such a reading of the two sections gives effect to each section and does not distort the language of the sections.

[13] Former RCW 9.94A.360(5) is now codified as RCW 9.94A.525(4).

Becker, 59 Wn. App at 852.

The court harmonized the statutes because the more general definition section of the SRA applies to several sections of the SRA, not only those dealing with the calculation of offender scores, and the statute specifically dealing with the calculation of offender scores, now RCW 9.94A.525(4), tells the court how to calculate anticipatory offenses. *Becker*, 59 Wn. App at 853-54. Under RCW 9.94A.525(4), the court is instructed to: "Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses." Under RCW 9.94A.525(5)(a)(ii) and (8), the trial court must count adult and juvenile violent offenses as two points convictions, of which second degree robbery is one. We are not persuaded to deviate from this analysis.

For the same reasons that *Becker* outlined, we hold that attempt must be treated the same as the completed crime. RCW 9.94.525(4). Thus, the trial court properly found that the doubling provision applies to Prather's second degree attempted assault.

V. No Contact Order

Prather argues that the 10-year no contact order issued in this case, for both Hogman and Bryant, is defective as it does not specify which count it is based on. The State concedes that the order is "potentially ambiguous" and urges us to remand to the trial court for clarification. We agree and remand to the trial court to clarify the order.

VI. SAG Issues

A. Sixth Amendment Violation

Prather argues that the trial court failed to protect his rights by granting the State's motion

to admit his spontaneous comments made during a Department of Corrections (DOC)

hearing.[14] The trial court admitted the statements for impeachment purposes only, but Prather argues that this was improper because it affected his willingness to testify in his own defense. Prather did not testify and the jury did not hear the statements.

The State properly asked the trial court to allow them to use Prather's prior statements for impeachment purposes only. The trial court held a CrR 3.5 hearing to examine the statements. The trial court properly admitted the statements for impeachment purposes only. This may have affected Prather's decision whether to testify, but as precedent makes clear, his choice to do so is a litigation tactic, not a matter of constitutional right. *See State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). In any case, the statements were proper impeachment.

B. Sufficiency of Evidence: Harassment Charges

Prather seems to argue that the two felony harassment convictions should have counted as "same criminal conduct." SAG at 1. In reality though, he clearly is challenging the sufficiency of his conviction for harassing both Hogman and Bryant. Prather states in his SAG that "[i]t is agreed that I was speaking to Josh only" when making threats. SAG at 1. "This leaves the question of whom was being directly spoken to or threatened? Who was put in fear?" SAG at 1.

[14] The statements made at the DOC hearing involved ownership of the MR2 car. During the DOC hearing, Prather spontaneously claimed ownership of the car. During his first trial, Prather claimed that the car was not his, and the State sought to admit evidence of Prather's contradictory statements made during the DOC hearing. The trial court permitted the State to recall Hines, who had been present at the DOC hearing, to testify in rebuttal on the issue of ownership of the MR2. The State, however, chose not to put Hines on the stand.

When facing a challenge to the sufficiency of the evidence, we ask whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Because credibility determinations are for the trier of fact and are not subject to review, *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Felony harassment consists of (1) a knowing threat, (2) to cause bodily injury immediately or in the future, and (3) words or conduct placing the person threatened in reasonable fear that the threat will be carried out.[15] RCW 9A.46.020(1). Accordingly, to convict Prather of two counts of harassment, the State had to present evidence that he knowingly communicated to Bryant and Hogman an intent to cause them bodily injury immediately or in the future and that Bryant and Hogman were placed in reasonable fear that Prather would carry out the threat.

The jury heard from Bryant, Hogman, and Prather. Prather denied everything but the malicious mischief. Both Bryant and Hogman testified to the harassment, Hogman specifically testifying that Prather said, "You're dead. She's dead. Your truck's gone. Burn your house down." 2 RP at 146. Viewing the testimony in the light most favorable to the State, the jury could have found beyond a reasonable doubt that Prather knowingly communicated to both

[15] A threat is a direct or indirect communication of the intent to cause bodily injury in the future. WPIC 2.24, at 71; RCW 9A.04.110(27)(a) (formerly (25)(a)). A defendant acts knowingly when he or she is aware of a fact, circumstance, or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime. A defendant also acts knowingly if he or she acts intentionally. WPIC 10.02, at 206; *see also* RCW 9A.08.010(1)(b), (2).

Bryant and Hogman an intent to cause them bodily injury in a manner consistent with the RCW 9A.46.020(1) requirements. We affirm Prather's harassment convictions.

C. Lesser Included Offense

Prather next argues that during the second trial, for second degree assault against Bryant, he was entitled to a lesser included offense instruction of felony harassment. Prather did not request a lesser included instruction at trial and he does not claim his counsel was ineffective for failing to request such an instruction. Prather simply asserts that the trial court should have included the lesser offense of felony harassment as an alternative to second degree assault. Without more information as to how or why he should have received the instruction, we will not review his claim.

D. Overcharging/Vindictive Prosecution

Prather contends that the prosecution acted vindictively when it "overcharged" him with 10 counts for simply "[pulling] a gun on a friend . . . and threaten[ing] him." SAG at 2. His claim fails.

A prosecuting attorney is vested with great discretion in determining how and when to file criminal charges. *State v. Korum*, 157 Wn.2d 614, 625, 141 P.3d 13 (2006); *see Deal v. United States*, 508 U.S. 129, 134 n.2, 113 S. Ct. 1993, 124 L. Ed. 2d 44 (1993) (recognizing prosecutors have "universally available and unvoidable power *to charge or not to charge* an offense"). Although the SRA, recognizes and supports prosecutorial discretion by setting out advisory charging guidelines, it does not dictate a prosecutor's charging decisions:

> These standards are intended solely for the guidance of prosecutors in the state of Washington. They are not intended to, do not and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party in litigation with the state.

RCW 9.94A.401; *Korum*, 157 Wn.2d at 625.

Prather further complains that the State only offered him one plea deal.[16] "Plea bargaining is a legitimate process, so long as it is carried out openly and above the table. . . ." *State v. Lee*, 69 Wn. App. 31, 36, 847 P.2d 25 (1993). Prather does not allege that plea bargaining was not carried out openly, only that he did not like the deal the State offered.

When we review a claim of pretrial prosecutorial vindictiveness, we do not presume vindictiveness. *Korum*, 157 Wn.2d at 628-29 (citing *State v. McDowell*, 102 Wn.2d 341, 344, 685 P.2d 595 (1984)). Proof of actual vindictiveness is required before we may invalidate the prosecutor's adversarial decisions made before trial. *McDowell*, 102 Wn.2d at 344. Prather has not done this and so his claim fails.

E. Officer Christianson's Remarks at Trial

Prather argues that comments Officer Christianson made at trial were "devastating . . . very prejudicial and damaging to [his] case." SAG at 4. At trial, Christianson testified that "all the prior involvements with Mr. Prather indicated he had guns or would be carrying a gun." 3 RP at 187. Prather's counsel immediately objected to the statement. The objection was sustained, and the trial court instructed the jury to disregard the statement. Prather argues that the trial court should have declared a mistrial and that he received ineffective assistance of counsel because his attorney did not move for a mistrial.

[16] There is no information in the record confirming this assertion.

To prevail on an ineffective assistance of counsel claim, a defendant must show that (1) defense counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A defendant must make both showings to prevail on an ineffective assistance claim. *Thomas*, 109 Wn.2d at 226 (quoting *Strickland*, 466 U.S. at 687). For the first prong, scrutiny of counsel's performance is highly deferential and we engage a strong presumption of reasonableness. *Thomas*, 109 Wn.2d at 226. If defense counsel's conduct can be characterized as trial strategy or tactics, it does not constitute deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The second prong requires the defendant to show that there is a reasonable probability that the trial's outcome would have differed absent counsel's deficient performance. *Hendrickson*, 129 Wn.2d at 78 (citing *Strickland*, 466 U.S. at 687).

Here, Prather's counsel objected to the statement and the trial court, in sustaining that objection, instructed the jury to disregard Christianson's comment. Prather must show that his counsel was deficient and that there is a reasonable probability that the result in his case would have differed but for counsel's inaction. He does not do this and his claim fails.

F. Sentencing Hearing

Prather asks us to review the sentencing hearing because he feels "as though Judge Warme was confused by sentencing guidelines and statutes." SAG at 4. After reviewing the sentencing hearing, we do not agree with Prather. The hearing was appropriately conducted.[17]

[17] Again, Prather urges us to review whether trial and conviction on the second degree assault and felony harassment constituted a double jeopardy violation. Since this matter was briefed by

We remand for resentencing and direct the trial court to clarify the no contact order.

Penoyar, J.

We concur:

Van Deren, C.J.

Quinn-Brintnall, J.

counsel, we will not address it again.